

FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Neil P. Reiff, Esq.  
300 M Street, SE  
Suite 1102  
Washington, DC 20003

JUN 26 2009

RE: MUR 5833  
Ohio Democratic Party and  
Dean DePiero, in his official  
capacity as treasurer

Dear Mr. Reiff:

On June 18, 2009, the Federal Election Commission accepted the signed conciliation agreement submitted on your client's behalf in settlement of a violation of 2 U.S.C. §§ 441d, 434(b)(4)(H)(iii), (6)(B)(iii), and (g)(2) and 11 C.F.R. § 104.4(a) and (b)(2), provisions of the Federal Election Campaign Act of 1971, as amended, ("the Act") and the Commission's regulations. Accordingly, the file has been closed in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). Information derived in connection with any conciliation attempt will not become public without the written consent of the respondent and the Commission. See 2 U.S.C. § 437g(a)(4)(B).

Enclosed you will find a copy of the fully executed conciliation agreement for your files. Please note that the civil penalty is due within 30 days of the conciliation agreement's effective date. If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Wanda D. Brown".

Wanda D. Brown  
Attorney

Enclosure  
Conciliation Agreement

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**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 5833  
Ohio Democratic Party and Dean DePiero, )  
in his official capacity as treasurer )

**CONCILIATION AGREEMENT**

This matter was initiated by a signed, sworn, and notarized complaint by the Ohio Republican Party. The Federal Election Commission ("Commission") found reason to believe that the Ohio Democratic Party and Dean DePiero, in his official capacity as treasurer ("Respondents"), violated 2 U.S.C. §§ 441d, 434(b)(4)(H)(iii), (6)(B)(iii), and (g)(2), provisions of the Federal Election Campaign Act of 1971, as amended (the "Act"), and 11 C.F.R. § 104.4(a) and (b)(2), of the Commission's regulations.

NOW, THEREFORE, the Commission and the Respondents, having participated in informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. The Ohio Democratic Party ("ODP") is a political committee within the meaning of 2 U.S.C. § 431(4), and Dean DePiero serves as its treasurer.

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2. The Act defines "contribution" and "expenditure" as a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made for the purpose of influencing an election for Federal office. See 2 U.S.C. §§ 431(8)(A)(i) and 431(9)(A)(i); 11 C.F.R. §§ 100.52 and 100.111(a) (defining "contribution" and "expenditure"). The term "anything of value" includes in-kind contributions of goods and services. 11 C.F.R. § 100.52(d)(1).

3. The payment by a state or local party committee of the costs of campaign materials used in connection with volunteer activities on behalf of any nominee of such party are not contributions or expenditures provided that, *inter alia*, the materials are distributed by volunteers and not by commercial or for-profit entities. See 11 C.F.R. §§ 100.87 and 100.147.

4. Similarly, costs associated with the preparation, display, or mailing or other distribution of a printed slate card are not contributions or expenditures. See 11 C.F.R. §§ 100.80 and 100.140. In order to qualify as a slate card, a communication must list three or more candidates for any public office for which an election is held in the state in which the committee is organized. *Id.*

5. All mass mailings paid for by a political committee (as well as any other type of general public political advertising by a political committee), whether coordinated with a candidate and/or a candidate's committee, or not, must display a disclaimer. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1); see 11 C.F.R. § 100.27. If not authorized by a candidate or candidate committee, the disclaimer must state the full name and permanent street address, telephone number, or World Wide Web address of the entity that paid for the communication and that the communication is not authorized by any candidate or candidate's authorized committee. 2 U.S.C. § 441d(a)(3), 11 C.F.R. §§ 110.11(b)(3) and (d)(3). If authorized by a

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candidate or candidate committee, the disclaimer must identify the committee that made the expenditure and must state that the communication is authorized by the candidate or the candidate's authorized committee. 2 U.S.C. § 441d(a)(2), 11 C.F.R. § 110.11(d)(1) and (2).

All disclaimers must appear in a printed box that is set apart from the other contents of the communication. 2 U.S.C. § 441d(c)(2), 11 C.F.R. § 110.11(c)(2)(ii).

6. Disbursements made for a communication result in an independent expenditure if the communication "expressly advocate[es] the election or defeat of a clearly identified candidate," and is not made in cooperation or consultation with the candidate, the candidate's authorized political committee, or their agents. 2 U.S.C. § 431(17)(A)-(B). The candidate is "clearly identified" when the name or photograph of the candidate appears in the communication. 2 U.S.C. § 431(18)(A)-(B). A communication "expressly advocates" when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 249 (1986) ("MCFL") ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature."). The Commission's regulations further provide that express advocacy includes communications containing an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate when

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taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b).

7. The Act requires that independent expenditures by a political committee on behalf of a Federal candidate be disclosed as such in reports filed with the Commission. A political committee must report independent expenditures that exceed \$200 each, or those made on behalf of the same candidate that aggregate over \$200 during the calendar year, on Schedule E of FEC Form 3X at the end of the first reporting period following the expenditure. 2 U.S.C. § 434(b)(4)(H)(iii) and 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a).

8. Political committees making or contracting to make an independent expenditure aggregating \$10,000 or more in a calendar year must initially disclose the expenditure on Schedule E of FEC Form 3X within 48 hours of the time the communication is publicly distributed or otherwise publicly disseminated. 2 U.S.C. § 434(g). Each 48-hour report must contain information indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. 2 U.S.C. § 434(b)(4)(H)(iii) and 11 C.F.R. § 104.4(b)(2).

9. During the 2006 election, the ODP paid \$157,754 to create and disseminate a four-page mailing featuring two Democratic Party candidates, Ted Strickland (for Governor) and Sherrod Brown. The mailing encouraged individuals to "vote by mail" for these two candidates and to "turn around Ohio" and "fight . . . corruption in Columbus and Washington." It also featured photographs of George W. Bush and former Senator Mike DeWine, and stated that "you don't have to wait until Election Day to send them a message." The mailing stated that Ted Strickland and Sherrod Brown would "put an end to corporate tax breaks that cost taxpayers millions and have left Ohio's families with the third worst tax burden in the nation." It highlighted Sherrod Brown's refusal "to accept the

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free health care benefits provided members of Congress until all Ohio families have access to adequate care” and argued that Strickland and Brown would “expand job growth by investing in entrepreneurship, innovation, and energy production” and that they would “provide access to world-class schools” to “challenge and prepare our children for the next-generation workforce.”

10. A disclaimer in a printed box stated that the mailing was “Paid for by the Ohio Democratic Party.” The disclaimer did not state whether or not the mailing was authorized by a candidate or candidate’s committee. The mailing was created and disseminated by the Ohio Democratic Party, and not in concert or cooperation with Sherrod Brown, Friends of Sherrod Brown, or any agent of either.

11. Because the mailing was handled by a direct mail company rather than by volunteers, and since the mailing does not feature the requisite three candidates to qualify as a slate card, it does not qualify as exempt activity. Therefore, the mailing required a statement indicating whether or not it was authorized by a candidate or candidate’s committee. *See* 11 C.F.R. § 110.11(e).

12. The mailing qualified as an independent expenditures because it expressly advocates the election of Sherrod Brown when it urges voters to “vote by mail to turn around Ohio” and identifies and provides photographs of Strickland and Brown as candidates who will “turn around Ohio.” Thus, the communication “provides in effect an explicit directive: vote for these (named) candidates.” *MCFL* at 249 (holding that a communication contained express advocacy where “the publication not only urges voters to vote for ‘pro-life’ candidates but also identifies and provides photographs of specific candidates fitting that description”). 11 C.F.R. § 100.22(a). It also appears that this advertisement contains express advocacy within the meaning of 11 C.F.R. § 100.22(b) because reasonable minds could not differ as to whether the ad

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encourages actions to elect or defeat a candidate" when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b).

13. In addition, because the mailing does not qualify as exempt activity, and because available information suggests that the mailing contained express advocacy and was therefore an independent expenditure by the Ohio Democratic Party on behalf of the Friends of Sherrod Brown Committee, the Ohio Democratic Party was required to disclose the disbursement for the mailing on Schedule E of FEC Form 3X at the end of the first reporting period following the expenditure. 2 U.S.C. § 434(b)(4)(H)(iii) and 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a).

14. Further, the Ohio Democratic Party was required to initially disclose the independent expenditure within 48 hours of the time the communication was publicly distributed or otherwise publicly disseminated. 2 U.S.C. § 434(g) and 11 C.F.R. § 104.4(b)(2). The report should have contained information indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. 2 U.S.C. § 434(b)(4)(H)(iii).

V. Respondents failed to include a proper disclaimer on a public communication, in violation of 2 U.S.C. § 441d, and failed to timely and properly disclose an independent expenditure on behalf of the Friends of Sherrod Brown Committee, in violation of 2 U.S.C. § 434(b)(4)(H)(iii), (6)(B)(iii), and (g)(2); and 11 C.F.R. § 104.4(a) and (b)(2).

VI. Respondents will take the following actions:

1. Respondents will pay a civil penalty to the Federal Election Commission in the amount of Fourteen Thousand Dollars (\$14,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

2. Respondents will cease and desist from violating 2 U.S.C. §§ 441d and 434(b)(4)(H)(iii), (6)(B)(iii), and (g)(2) and 11 C.F.R. § 104.4(a) and (b)(2).

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VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.


IX. Respondents shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained in this written agreement shall be enforceable.

FOR THE COMMISSION:

Thomasenia P. Duncan  
General Counsel

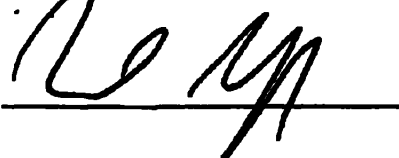
BY:

  
Ann Marie Terzaken  
Associate General Counsel  
for Enforcement

6/24/09  
Date

FOR THE RESPONDENTS:

BY:



6/3/09  
Date

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